(139)

H.F.R.

HIGH COURT OF CHHATTISGARH : B ASPUR

Division Bench : Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

Criminal Appeal No.555 of 2001

Dhanya Kumar Jain & Another

Versus

State of Chhattisgarh

Criminal Appeal No.689 of 2001

Majeed Mirja

Versus

The State of Chhattisgarh

&

Criminal Appeal No.737 of 2001

P. Santosh

Versus

State of Chhattisgarh

Judgment for consideration

Sd/-
L.C. BHADOO
Judge

Hon'ble Shri Justice Sunil Kumar Sinha

I agree.

Sd/-
Sunil Kumar Sinha
Judge

Post for judgment/5th-10-2007

Sd/-
L.C. BHADOO
Judge

(140)

HIGH COURT OF CHHATTISGARH : BILASPUR

Division Bench : Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

Criminal Appeal No. 555 of 2001

Appellants :

1. Dhanya Kumar Jain, son of Kodulal Jain, aged 44 years, resident of Bajrang Choukh, P.S. Nevra, District Raipur (CG).

2. Sonal Kumar Jain alias Sonu Jain, son of Dhanya Kumar Jain, aged 21 years, resident of Bajrang Choukh, P.S. Nevra, District Raipur (CG).

Versus

Respondent : State of Chhattisgarh

Criminal Appeal No. 689 of 2001

Appellant : Majeed Mirja, S/o Late Jamal Beg, aged about 25 years, R/o Upadhay Chowk, Tilda, P.S. Newra, District Raipur.

Versus

Respondent : The State of Chhattisgarh

&

Criminal Appeal No. 737 of 2001

Appellant : P. Santosh, S/o C. Selwa Raj, aged 22 years, R/o Upadhaya Chowk, Tilda, P.S. Newra, Distt. Raipur.

Versus

Respondent : State of Chhattisgarh

(Appeals under Section 374 (2) of the Code of Criminal Procedure)

Present :-

Shri Surendra Singh, Sr. Advocate with Shri Neeraj Mehta & Shri Adil Minhaz, counsel for the appellants in Cr.A.Nos.555/2001 & 737/2001.

Shri Arun Kochar, counsel for the appellant in Cr.A.No.689/2001.

Shri Akhil Mishra, Panel Lawyer for the State.

Shri Vivek Ranjan Tiwari, counsel for the objector.

---

(121)

JUDGMENT

(Delivered on 15th October, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J.***

Criminal Appeal No.555/2001 filed by Dhanya Kumar Jain & Sonal Kumar Jain @ Sonu Jain, Criminal Appeal No.689/2001 filed by Majeed Mirja and Criminal Appeal No.737/2001 filed by P. Santosh are being disposed of by this common judgment as all these three appeals are arising out of one Sessions Trial No.354/1999 before the Court of Second Additional Sessions Judge, Raipur.

2) By these appeals under Section 374(2) of the Cr.P.C., accused/ appellants have questioned the legality & correctness of the judgment of conviction & order of sentence dated 19-6-2001 passed by the Second Additional Sessions Judge, Raipur, in Sessions Trial No.354/1999 whereby & whereunder they have been convicted & sentenced as under :

S.No.	Name of the accused	Conviction for offence	Sentence
1.	Dhanya Kumar Jain	120B of IPC (for murder of Manoj Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		120B of IPC (for murder of Pavi Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		120B of IPC (for attempt to commit murder of Archana Jain)	R.I. for 7 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
		120B of IPC (for theft of documents)	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 6 months.
		201 of IPC	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 1 year.
		411 of IPC	R.I. for 2 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 6 months.
2.	Sonal Kumar Jain @ Sonu Jain	302/34 of IPC (for murder of Manoj Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.

1442

		302/34 of IPC (for murder of Pavi Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		307/34 of IPC (for attempt to commit murder of Archana Jain)	R.I. for 7 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
		380 of IPC	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 6 months.
		201 of IPC	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 1 year.
		460 of IPC	R.I. for 10 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
3.	Majeed Mirza	302 of IPC (for murder of Manoj Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		302 of IPC (for murder of Pavi Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		307 of IPC (for attempt to commit murder of Archana Jain)	R.I. for 7 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
		380 of IPC	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 6 months.
		460 of IPC	R.I. for 10 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
4.	P. Santosh	302 of IPC (for murder of Manoj Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.
		302 of IPC (for murder of Pavi Jain)	R.I. for life & to pay a fine of Rs.10,000/- in default of payment of fine to further undergo R.I. for 5 years.

(113)

		307 of IPC (for attempt to commit murder of Archana Jain)	R.I. for 7 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.
		380 of IPC	R.I. for 3 years & to pay a fine of Rs.2,000/- in default of payment of fine to further undergo R.I. for 6 months.
		460 of IPC	R.I. for 10 years & to pay a fine of Rs.5,000/- in default of payment of fine to further undergo R.I. for 2 years.

3) The admitted facts are that deceased Manoj Jain was the real brother of accused/appellant Dhanya Kumar Jain & uncle of accused/appellant Sonal Kumar Jain @ Sonu Jain whereas deceased Pavi Jain was son of deceased Manoj Jain & injured eyewitness Archana Jain is wife of deceased Manoj Jain.

4) Case of the prosecution, in brief, is that around the year 1994, oral partition was effected between brothers i.e. accused/appellant Dhanya Kumar Jain & Manoj Jain (since deceased). Manoj wanted to sell the boiler of rice mill, which was objected by appellant Dhanya Kumar Jain. A plot of land known as "*Bhondu Ka Bagicha*" has also came to the share of Manoj. It is stated that the price of that land escalated sharply, therefore, appellant Dhanya Kumar Jain and his son Sonal Kumar Jain @ Sonu Jain wanted a share in that land. The documents relating to the properties were in possession of Manoj, therefore, a criminal conspiracy was hatched by Dhanya Kumar Jain along with his son Sonal Kumar Jain, they hired accused persons namely, Majeed Mirja & P. Santosh, to commit the theft of documents, which were in possession of Manoj. In furtherance of that conspiracy in the intervening night of 11/12-5-1999 accused P. Santosh & Majeed Mirja along with Sonal Kumar Jain entered the house of Manoj Jain situated at village Sasaholi by breaking open the window. They entered the bed room of Manoj Jain where he along with his wife Archana (injured) & son Pavi Jain (since deceased), aged about 4 years, were sleeping. In furtherance of common intention and conspiracy accused/appellants Majeed Mirja & P. Santosh attacked Manoj with iron rods, as a result of which he died spontaneously. They also attacked & threw Pavi Jain, the child aged about 4 years, on the ground and committed his murder. They also attacked Archana Jain on her head with iron rod. They committed theft of various documents relating to the property and left all the 3 persons in the room.

After locking the main door of the house from the outside they fled away from the scene of occurrence.

5) Further case of the prosecution is that on 12-5-1999 at about 10.00 a.m., Santosh Agrawal, Satish Jain, Nirmal Dubey & Padum Marar, gave intimation to Police Station Nevra, District Raipur, to the effect that the house of Manoj Jain, situated at village Sasaholi, is locked from outside. There is no movement in the house, when they peeped inside the house through a window they saw that lot of blood is lying at the door of bed room of deceased Manoj, but on account of darkness in the room nothing is visible. It appears that some untoward incident has taken place in the house of Manoj Jain.

6) Receiving this information Sub Inspector Jawahar Mishra along with A.S.I. R.K. Vaishnav, Constables Chudamani & Sirottam and Head Constable Mohd. Asrar, arrived to the house of Manoj Jain and saw that there was a red colour lock on the door of the house. Therefore, the lock was broke open. They entered the bed room of Manoj Jain through parchi, the light of bed room was off, therefore, they put on the light and saw that the body of Manoj drenched with blood was lying in the bed room, there were fatal injuries on the head of Manoj. Blood was splashed near the body of Manoj. Body of Pavi Jain (son of deceased Manoj), aged about 4 years, drenched with blood was lying between the bed & steel Almirah. There was injury on the head of Pavi Jain and lot of blood splashed near the body of Pavi Jain. In between two bodies Archana Jain was sitting on a plastic chair in a pool of blood in an unconscious condition. There was a fatal injury on her head. She was not able to speak. Blood was oozing out of the head. Body of Archana was covered with a saree. Bed sheets & pillows of the bed were also stained with blood. One blood stained saree was lying near the bed. Lot of blood splashed in the room. In the room one door of Almirah & one door of safe were open. Ornaments of Archana were on her body. Therefore, dehatinalishi (Ex.P/63) was prepared on the spot. Based on that Crime No.68/1999 under First Information Report (Ex.P/66) was registered. Merg intimations under Ex.P/64 in respect of death of Manoj & Ex.P/65 in respect of death of Pavi Jain were given. Merg (Ex.P/61) in respect of death of Manoj & Merg (Ex.P/62) in respect of death Pavi were prepared. Investigating Officer, after giving notice under Ex.P/1 & Ex.P/2 to the Panchas, prepared inquest under Ex.P/3 on the body of Manoj & under Ex.P/4 on the body of Pavi. The broken lock was seized under Ex.P/5. One wooden plank of window was seized under Ex.P/6. Hairs, which were found in the fist of Manoj, were seized under Ex.P/7. Blood stained cement floor &

(145)

plain cement floor from the place of occurrence where the body of Manoj was lying, was seized under Ex.P/8, under Ex.P/9 from the place where the body of Pavi was lying & under Ex.P/10 from the place where Archana was sitting on the chair. Blood stained bed sheets; pillows & saree were seized under Ex.P/11. One blood stained bra & underwear were seized under Ex.P/12. One will executed by Chameli Bai in favour of Archana Jain, two blank stamp papers bearing the signature of Chameli Bai were seized under Ex.P/13. One piece of broken chain of the door was seized under Ex.P/14. Clothes of Pavi Jain sent by Doctor were seized under Ex.P/15. Clothes of Manoj sent by Doctor were seized under Ex.P/16. Photographs of footprint on the tea table taken by Nirmal & negatives were seized under Ex.P/17. Site plan of the place of occurrence (Ex.P/18) was prepared by the Halka Patwari. Panchnama under Ex.P/20 was prepared in respect of the breaking of lock. Vaginal slides of Archana were taken under Ex.P/21. Memorandum of accused Sonal Kumar Jain was recorded under Ex.P/24. Key of the lock was seized at the instance of Sonal Kumar Jain under Ex.P/22. A file containing 80 documents regarding property was seized from accused Dhanya Kumar under Ex.P/25. Motorcycle along with R.C. books & one TVS Suzuki were seized under Ex.P/23. In order to verify as to whether the key, which was recovered at the instance of accused Sonal Kumar Jain, is of the broken lock same was tested by applying the same on the broken lock, a panchnama (Ex.P/26) of the same was prepared. Memorandum of accused persons Majeed Mirja & P. Santosh regarding iron rod, weapon of offence, was recorded under Ex.P/27 & Ex.P/28, respectively. In pursuance of that one iron rod under Ex.P/29 was seized at the instance of accused Majeed Mirja & one iron rod under Ex.P/30 was seized at the instance of accused P. Santosh. Clothes of Majeed Mirja, P. Santosh, Sonal Kumar Jain were seized under Ex.P/31, Ex.P/32 & Ex.P/33 respectively. Order book was seized under Ex.P/34 from Pooran Lal Sahu. Injuries on the body of Archana were examined in Mission Hospital, Tilda, on 12-5-1999 by PW-8 Dr. Umesh Suna. He found that there was a lacerated wound on the left temporal region in the size of 5" x ½" x ½" & there was one incised wound on the right side of the forehead in the size of 1" x ¼" x ¼", which were found dangerous to life. Injury report is Ex.P/38. Finger print of Sonal Kumar Jain, Majeed Mirja & P. Santosh were taken under Ex.P/45, Ex.P/46 & Ex.P/47, respectively. Photograph of fingerprint, which was on the door of safe of Almirah, was taken under Ex.P/48, which was sent to Finger Print Expert, Police Headquarters, Madhaya Pradesh, Bhopal. Body of Manoj was sent for postmortem examination under Ex.P/53-A to Government Hospital, Nevra,

(146)

where PW-14 Dr. D.R. Verma conducted postmortem. He opined that Manoj died due to coma; haemorrhage, as a result of head injury due to multiple incised wound & fracture of skull. Death was homicidal in nature. Postmortem report is Ex.P/53. Body of Pavi was sent for postmortem examination under Ex.P/54-A to Government Hospital, Nevra, where PW-14 Dr. D.R. Verma conducted postmortem. He opined that Pavi died due to coma, haemorrhage, as a result of head injury, fracture of skull & brain matter was coming out. Death was homicidal in nature. Postmortem report is Ex.P/54. Archana was referred to MMI Institute where her injuries were examined and in that respect Ex.P/68 was prepared. Her dying declaration (Ex.P/69) was recorded. Accused P. Santosh was put to identification parade before the Executive Magistrate Ashok Tiwari and Archana identified P. Santosh correctly. Identification memo (Ex.P/70) was prepared. Majeed Mirza was also put to identification and he was identified by Archana. Identification memo (Ex.P/71) was prepared in that respect. Seized articles were sent for chemical examination to Forensic Science Laboratory, Sagar, from where reports Ex.P/103 & Ex.P/105 were received.

7) After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Raipur, who in turn committed the case to the Court of Sessions Judge, Raipur, from where learned Additional Sessions Judge, Raipur, received the same on transfer for trial.

8) In order to establish the charges against the accused/appellants, the prosecution examined 33 witnesses. Statements of the accused were recorded under Section 313 of the Code of Criminal Procedure in which they denied the material appearing against them in the prosecution evidence. Accused Sonal Kumar Jain further stated that he is innocent, he has been falsely implicated in the crime & his signatures were obtained on blank papers by police by beating him. Majeed Mirja stated that chappals were not seized from him, police obtained his signatures on blank papers, he has been falsely implicated in crime, he is the president of Janvadi Mukti Morcha and under his leadership the labourers of rice mill were on strike for 1&½ month. He also stated that accused P. Santosh is his associate. Therefore, the mill owners have got him implicated in a false case. Similar is the statement of P. Santosh. Accused Dhanya Kumar Jain has also stated that he is innocent, he has been implicated in a crime at the behest of brothers of Archana Jain, as the Brothers of Archana Jain want to grab the joint property of their family. They examined DW-1 Sevat Ali & DW-2 Ajij Mirza in their defence.

(147)

9) Learned Additional Sessions Judge after hearing learned counsel for the respective parties, convicted and sentenced the accused/appellants as aforementioned.

10) We have heard Senior Advocate Shri Surendra Nagar, Shri N.K. Mehta, Shri Adil Minhaz & Shri Arun Kochar, learned counsel for the appellants, Shri Akhil Mishra, learned Panel Lawyer for the State & Shri Vivek Ranjan Tiwari, learned counsel for the objector.

11) Learned counsel for the appellants have not disputed the homicidal death of Manoj Jain & Pavi Jain. Moreover, PW-4 Dr. D.R. Verma, who conducted postmortem on the body of Manoj on 12-5-1999, has stated that there were 17 incised wounds on the head & skull bone was fractured from centre, front & right side. Cause of death was haemorrhage, incised wounds & fracture of skull bone. Death was homicidal in nature. Postmortem report is Ex.P/53. He has further stated that he had also conducted postmortem on the body of Pavi Jain. There was an incised wound in the size of 6 cm. length, which pierced up to the brain and the brain material was coming out & skull was fractured. Cause of death was fracture of skull, coming out of brain material & haemorrhage. Death was homicidal in nature. Postmortem report is Ex.P/54. Therefore, in view of the above evidence, it is established that death of Manoj & Pavi was homicidal in nature. Even, learned counsel appearing for the appellants have not disputed the injuries on the body of Archana. Moreover, PW-8 Dr. Umesh Suna, has stated that on 12-5-1999 he examined the injuries of Archana Jain. There was a lacerated wound on the temporal region in the size of 5" x ½" x ½", which was caused by hard & blunt object and the same was dangerous to life. Injury report is Ex.P/38. He has further stated that he examined the rod sent by Police Station Nevra and it was possible to cause injury by the said rod, which was found on the body of Archana. He prepared his report under Ex.P/40.

MOTIVE BEHIND THE CRIME

12) Deceased Manoj Jain was the real brother of accused Dhanya Kumar Jain & uncle of accused Sonal Kumar Jain. Both the brothers were joint owners of their family properties. As per the record, after the marriage of Manoj with Archana in the year 1991, by oral partition, the properties were partitioned. After partition accused Dhanya Kumar Jain, who was earlier living at Sasaholi, shifted to Nevra whereas deceased Manoj shifted to Sasaholi. A plot of land known as "*Bhondu Ka Bagicha*" situated at Sasaholi came to the share of Manoj. The price of "*Bhondu Ka Bagicha*" was escalated sharply. Therefore, Dhanya Kumar Jain & Sonal Kumar Jain

(148)

wanted share in that. Manoj wanted to sale the boiler, which was objected by Dhanya Kumar. Even 2-3 days prior to the date of incident the sale price of boiler was settled by Manoj. Documents of various properties were in possession of Manoj. Therefore, Dhanya Kumar & Sonal Kumar wanted to take possession of those documents. That is why in the fateful night Sonal along with two accused persons namely, Majeed Mirja & P. Santosh entered the house of Manoj by breaking window. In that process ghastly murders of two persons i.e. Manoj and his minor son Pavi, were committed whereas Archana, wife of Manoj, was also attacked to commit her murder, as a result of which she sustained fatal injuries on vital parts of body & she became unconscious. Therefore, in connection with share in property, there was a serious dispute between the families of two brothers. Prosecution case is that on account of property there was a dispute between the parties and that was the motive behind the crime in question.

13) PW-18 Archana Jain, wife of Manoj, in para 7 of her evidence, has stated that after her marriage with Manoj, she was residing with her husband at Nevra whereas Sonal & others were residing at Sasaholi. About 4-5 years back partition was effected between two brothers. In that partition 35 acres of land, clothes shop & boiler came to the share of Manoj as well as house situated at Sasaholi, tractor & mini truck also came to the share of Manoj. Even her sister-in-law (*Nanand*) namely, Chameli Bai bequeathed the land admeasuring 29-30 acres through a will. There is a patch of land admeasuring 7-8 acres adjoining to Sasaholi house, which is known as "*Bhondu Ka Bagicha*". For that Sonal used to quarrel with them. On account of that 2-3 times he gave beating to Manoj. Mother of Sonal (*Jetani* of Archana) used to beat her. She also used to say that their family will be ruined and they will bring them on record. Therefore, Archana (PW-18) asked Sonal that as and when he comes to Sasaholi he should not visit their house. The price of "*Bhondu Ka Bagicha*" was escalated sharply, because the same was situated near the Railway line. Sonal wanted that land. That is why he used to quarrel. Dhanya Kumar used to say that if the *Bagicha* land is not transferred to his name, then there will be a bloodshed. Dhanya Kumar also used to say that by mistake the said land has been given to Manoj. Deceased Manoj wanted to sale the boiler in order to make the payment of debts, but Dhanya Kumar was objecting the same. Even a deal was stuck for selling the boiler 2-3 days prior to the date of incident. She has also stated that as far as rice mill is concerned, in the rice mill her brother & father as well as Dhanya Kumar were the partners. Dhanya Kumar used to

(149)

collect the sale money of rice and expenses were to be paid by Manoj (her husband).

14) PW-20 Mukesh Kumar Jain (brother of Archana) has stated that he along with his father, Manoj & Dhanya Kumar took a rice mill on lease in Nevra in the year 1997. That mill was in their partnership. Through that they used to do custom milling of paddy and used to sell the said rice. They used to bring paddy from Government & after converting the same into rice they used to give the same to FCI godowns. He spent about Rs.4.00 lacs in that. At that time Manoj used to reside at Nevra, but after some time he shifted to Sasaholi. He also shifted to Sasaholi to reside along with Manoj. Mill was being supervised by him, Manoj & Dhanya Kumar. Accounts were being maintained by him, but money was being taken by Dhanya Kumar. Once rice was sold by Dhanya Kumar, whereas the same was Government rice. As and when he along with Manoj used to demand money & accounts of sale, Dhanya Kumar used to quarrel with them. Therefore, the mill was running in a loss. Manoj informed that the property was already partitioned between the two brothers, Dhanya Kumar used to demand the share in the property, which came to the share of Manoj. Dhanya Kumar wanted that the properties should be re-partitioned. On account of that there was a dispute between the two brothers.

15) PW-17 Upendra Kumar Jain (another brother of Archana) has also corroborated the above evidence.

16) As per the evidence of Archana (PW-18) the documents C-1 to C-80, which were seized under Ex.P/25 from the house of Dhanya Kumar, were in their possession & lying in their Almirah.

17) Perusal of the seizure memo (Ex.P/25) reveals that in all 80 documents were seized on 24-5-1999. Among them one loan book in the name of Manoj, one loan book and the land ownership document in the name of Dhanya Kumar, Manoj & Shanti Bai were seized. Various documents & stamps relating to M/s Digambar Trading Company, which was partnership firm of both the brothers, were seized. These documents are relating to the various properties of deceased Manoj & accused Dhanya Kumar. Case of the prosecution is that in order to grab those documents, which were in possession of Manoj, conspiracy was hatched and in furtherance of that conspiracy those documents were taken away by the accused namely, Sonal along with Majeed Mirja & P. Santosh in the fateful night. In that process, they committed murder of two persons namely, Manoj and his minor son Pavi & attempted to commit murder of Archana also.

(150)

18) Therefore, from the above evidence, it is established that there was a serious dispute between the two brothers regarding the share in the properties. Documents were in possession of deceased Manoj. On account of that Sonal used to beat Manoj and the mother of Sonal used to quarrel with Archana. Therefore, it is established that there was a motive behind the crime.

DHANYA KUMAR JAIN

19) Dhanya Kumar Jain has been charged & convicted for the commission of offence under Sections 120B, 201 & 411 of the IPC.

20) Shri Surendra Singh, learned senior counsel appearing for the accused/appellants Dhanya Kumar Jain & Sonal Kumar Jain @ Sonu Jain, argued that the prosecution has utterly failed to establish the circumstances through which an attempt has been made that accused Dhanya Kumar Jain hatched a conspiracy with other accused persons. He further argued that the evidence of recovery witnesses namely, PW-3 Nirmal Kumar Dubey, PW-21 Anil Kumar Wadhva & PW-33 Jawahar Mishra, Investigating Officer, is not reliable. The prosecution has utterly failed to establish that the documents in question were seized from the possession of Dhanya Kumar. He also argued that the evidence of PW-24 Ashok Kumar is also wholly unreliable because the evidence of this witness regarding conspiracy hatched between Dhanya Kumar, Majeed Mirja & P. Santosh is contradictory to his previous statement. Shri Surendra Singh, learned senior counsel, submitted that the evidence of PW-18 Archana to the effect that while committing the crime Sonal asked the other co-accused persons that his father has said that no one should be left alive also does not inspire confidence. This evidence has been created just to implicate Dhanya Kumar in a false case.

21) On the other hand, Shri Akhil Mishra, learned Panel Lawyer for the State assisted by Shri Vivek Ranjan Tiwari, learned counsel for the victim, supported the judgment of learned trial Court.

22) The conspiracy punishable under Section 120B of the IPC has been defined under Section 120A of the IPC, which envisage that :

> "When two or more persons agree to do, or cause to be done,
>
> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

(151)

> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

23) The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.

24) For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

25) Direct evidence of the conspiracy is seldom available. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.

(152)

Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

26) As has been held by the Apex Court in the matter of **Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra**[1] "there is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence".

27) Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.

28) As has been held by the Apex Court in the matter of **Suresh Chandra Bahri v. State of Bihar**[2],

> "In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120-B."

29) In the matter of **E.K. Chandrasenan v. State of Kerala**[3], the Apex Court held that

---

[1] AIR 1965 SC 682
[2] 1995 Supp (1) SCC 80
[3] (1995) 2 SCC 99

153

> "Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence."

30) Again in the matter of **Kehar Singh v. State (Delhi Admn.)**[4], the Apex Court held that

> "275. Generally a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

31) It has been held in the matter of **State of Bihar v. Pramhans Yadav**[5], conspiracy can be proved by circumstances and other materials.

32) In the matter of **State of Maharashtra v. Som Nath Thapa**[6], the Apex Court has held that

> "To establish a charge of conspiracy *knowledge* about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

---

[4] (1988) 3 SCC 609
[5] 1986 Pat LJR 688 (HC)
[6] (1996) 4 SCC 659

(154)

33) In the present case the prosecution has tried to establish the charge of 120B of the IPC against accused Dhanya Kumar Jain through the following circumstances :

i) That, PW-24 Ashok Kumar saw & heard accused Dhanya Kumar while hatching conspiracy with accused persons Majeed Mirja & P. Santosh 5-6 days prior to the date of incident at about 10.00 p.m. near his photo studio.

ii) That, the documents regarding the ownership of various properties, which were in possession of deceased Manoj, were stolen in the fateful night in furtherance of conspiracy by Sonal Kumar & two other accused persons Majeed Mirja & P. Santosh, the same were handed over to Dhanya Kumar and ultimately those documents were seized from the possession of Dhanya Kumar on 24-5-1999 under Ex.P/25.

iii) That, at the time of commission of crime, Sonal Kumar, at the place of occurrence, asked two other accused persons Majeed Mirja & P. Santosh that his father has asked him that no one should be left alive in the house.

34) **First circumstance :** As far as this circumstance is concerned, PW-24 Ashok Kumar has stated that about 5-6 days prior to the date of incident at about 10.00 p.m. he saw that Dhanya Kumar was talking with three other accused persons at some distance from his photo studio regarding giving & taking. When he went near to them, Dhanya Kumar & others kept mum and started looking at him, therefore, he thought that they must be discussing some private thing that is why he returned back. About 5-6 days thereafter murder of Manoj was committed. In the protest of murder of Manoj, a call was made to close the town & a public procession was taken, on which the Sub Inspector gave assurance that he is trying to arrest the accused persons. Sub Inspector also said that if any person knows about the culprits, then he should inform him over telephone. He will not disclose his name. When, after some time, the accused persons were

(155)

caught and that appeared in a newspaper, then he realized that on that day Dhanya Kumar & others were talking about this crime.

35) After close scrutiny of the evidence of this witness i.e. PW-24 Ashok Kumar, we are of the considered opinion that this witness is wholly unreliable for the following reasons :

a) In examination-in-chief this witness has stated that 5-6 days prior to the date of incident at about 10.00 p.m. accused Dhanya Kumar was talking to three persons adjoining to his photo studio. Dhanya Kumar was talking about some deal of giving & taking.

b) In para 8 of his cross-examination, he has stated that they were talking on the road near to his shop at a distance of 10 miters.

c) In para 10 he stated that in Police diary statement (Ex.D/3) he has not stated that they were talking in an isolated place behind his shop. He did not disclose to Police that Dhanya Kumar was saying, "it should not be like this, it is too much". He also disclosed to Police that Sonal was also present among those persons, but the same is not written in Police case diary statement (Ex.D/3). If it is not written in Police case diary statement, then he cannot assign reason as to why Police has not written that. He has further stated that Jawahar Mishra, Sub Inspector, called him about 9-10 days after the public procession. He disclosed everything to him. He has also stated that on the day of procession he disclosed everything to Sub Inspector. His statement (Ex.D/3) was not recorded on 16-8-1999.

36) Perusal of evidence of PW-24 Ashok Kumar shows that the same is totally contradictory to his Police case diary statement (Ex.D/3), in which he had stated that Dhanya Kumar & others were talking in an isolated place behind his photo studio whereas before the Court he has stated that they were talking on road adjoining to his shop. In Police case diary statement

(156)

he stated that he saw Dhanya Kumar Jain, Majeed Mirza & P. Santosh talking about giving & taking of money whereas in the Court evidence he has stated that Dhanya Kumar was talking with three persons. Sonal was also among them. Moreover, he has stated that he disclosed about the said talk to the Sub Inspector Jawahar Mishra on the day of procession & also about 9-10 days after public procession that comes to about 20-5-1999 whereas his Police case diary statement (Ex.D/3) was recorded on 16-8-1999 i.e. about more than three months from the date of incident. Moreover, he has admitted that he is a photographer. On other occasions also he took photographs on asking by Police. Sub Inspector Jawahar Mishra is also known to him. Therefore, there is a contradiction between the Court evidence & Police case diary statement on material aspect of conspiracy regarding number of persons, place of talking & other things also. For the first time, he gave statement on 16-8-1999 i.e. about three months after the date of incident. When he came to know that Dhanya Kumar was talking about the incident, then why he did not disclose this fact to the Sub Inspector immediately. All these factors make this witness wholly unreliable. Therefore, no reliance can be placed on the evidence of such a witness.

37) **Second circumstance :** As far as this circumstance is concerned, it is admitted position that Dhanya Kumar, Sonal, another son of Dhanya Kumar, two daughters & mother of Dhanya Kumar, were residing together in the first floor of the common house. It is also admitted position that documents were not recovered at the instance of the accused Dhanya Kumar. No memorandum of Dhanya Kumar was recorded by the Investigating Officer regarding the place where he kept the documents and that too that the documents were in his exclusive possession. Memorandum (Ex.P/24) of accused Sonal was recorded on 22-5-1999 at about 2.00 p.m., in which he gave information regarding the place where he kept the key of the lock of the house of deceased Manoj as also the documents, which were brought from the house of Manoj. In this memorandum also Sonal has not stated that he gave the documents to his father and he has kept those documents at such & such place. The evidence regarding recovery and that too from the exclusive possession of Dhanya Kumar is wholly unreliable.

38) PW-3 Nirmal Kumar Dubey, who is witness to recovery as well as to the memorandum (Ex.P/24), in para 12 of his evidence stated that before seizure of key, Police recorded the memorandum of accused Sonal, he disclosed that key & documents are at his residence. Memorandum to that

(157)

effect (Ex.P/24) was recorded. He has further stated that documents were seized from the Almirah of Dhanya Kumar, but who brought the documents he does not know. Seizure memo (Ex.P/25) was prepared, which bears his signature. There were number of documents. The documents (C-1 to C-80) were seized. They are in Court. These documents were seized from the house of Dhanya Kumar. In para 14 of his evidence, he has stated that when the seizure memo (Ex.P/25) was read over to this witness, then he stated that these documents were not seized from Dhanya Kumar. In para 16 he has stated that there are eight rooms in the first floor of the house of Dhanya Kumar. In which Dhanya Kumar, Sonal, brother, mother & two sisters of Sonal and the mother of Dhanya Kumar, aged about 85 years are residing. In para 22 he has stated that the papers were seized on 24-5-1999. They were lying in Almirah, which was opened. In that Almirah clothes of women were lying. Mother of Dhanya Kumar was sitting in the room from where the documents were seized. At that time Dhanya Kumar was standing in the courtyard of the ground floor. Sub Inspector said that as the house belongs to Dhanya Kumar, therefore, we will show this recovery from Dhanya Kumar. Therefore, the evidence of this witness shows that, in fact, the documents were not recovered at the instance of Dhanya Kumar or Dhanya Kumar took the Sub Inspector along with the witnesses to the place where documents were given by him to the Investigating Officer and that was in his exclusive possession.

39) As far as evidence of PW-21 Anil Kumar Wadhva is concerned, he has stated that accused Sonal gave memorandum (Ex.P/24) regarding key & documents. He has stated that accused Dhanya Kumar brought one file relating to documents and handed over. Memorandum of the same was prepared under Ex.P/25. Documents (C-1 to C-80) are the same, which were seized from Dhanya Kumar. In para 21 of cross-examination he has stated that he is not able to recollect that whether the papers were seized on the day when the key was seized. He does not recollect at what time the documents were seized. The documents were given by Dhanya Kumar in the house whereas the seizure memo was prepared outside the house. It is correct that he along with Jawahar Mishra were standing outside the house. Dhanya Kumar went inside the house, brought file & handed over the same to Jawahar Mishra whereas PW-3 Nirmal Kumar Dubey has stated that the documents were recovered from a room where the mother of Dhanya Kumar was sitting. This witness (PW-21 Anil Kumar Wadhva) has further stated that he does not know from where Dhanya Kumar brought the file.

(158)

40) PW-33 Jawahar Mishra, Sub Inspector, has stated that on 22-5-1999 accused Sonal gave memorandum (Ex.P/24) regarding key & documents. On 23-5-1999 key was seized. On that day Dhanya Kumar was not present in the house, therefore, documents were not seized. When on the next day Dhanya Kumar came, they went to his house, recovered the file containing documents (C-1 to C-80) and prepared seizure memo under Ex.P/25. In para 71 of his cross-examination he has stated that accused Sonal disclosed that he has given the papers to his father, but no memorandum to that effect was recorded. In para 73 he has stated that he made enquiries from Dhanya Kumar, but no memorandum was recorded. At that time Nirmal Kumar & Wadhva were with him. He has further stated that he did not see from which place Dhanya Kumar brought the file. Sonal brought his clothes from the upper-story of the house and gave him in the courtyard. Even the Investigating Officer has not stated that in the first instance Dhanya Kumar gave memorandum regarding the place where he kept the documents and further that Dhanya Kumar took them to that place and got recovered the documents.

41) Therefore, from the evidence of two independent witnesses namely, PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva as also the evidence of PW-33 Jawahar Mishra, Investigating Officer, the prosecution has utterly failed to establish that accused Dhanya Kumar gave any memorandum regarding place where he kept the file with documents and that at the instance of accused Dhanya Kumar the file was recovered from a place, which was within his exclusive possession. Moreover, it is admitted position that in that house apart from Dhanya Kumar his other family members are residing. Mother of Dhanya Kumar is also residing in the said house. PW-3 Nirmal Kumar Dubey has stated that the documents were seized from the room in which the mother of Dhanya Kumar was sitting & ladies clothes were lying there. Therefore, the prosecution has utterly failed to establish that the documents were within the exclusive possession of Dhanya Kumar and no other family members were having knowledge about that file/documents. Therefore, the prosecution has failed to connect the accused, based on the recovery of file, with the crime in question and to establish that Dhanya Kumar hatched conspiracy with other accused persons to commit the crime. In furtherance of conspiracy some documents were brought & given to him and later on which were seized from his exclusive possession.

42) **Third circumstance :** As far as this circumstance is concerned, PW-18 Archana, in para 3 of her Court evidence has stated that Sonal

159

asked her for key of Almirah and at that time he asked other two accused persons that "*Papa has said that all should be finished and no one should remain alive*". This fact does not find place in her statement (Ex.P/69) recorded by the Tahsildar on 19-5-1999. Explanation has been given by her that she disclosed whatever was asked by the Magistrate. In this connection, if we look into question No.9 put to her, the said question was to the effect that when those persons were attacking you whether at that time they were talking anything ? The reply to the said question was given by this witness as "No. She only heard that Sonal said that no one should be left (*Bachne Na Paye*)", only that much she heard. She had not stated that Sonal said to the other accused persons that father has said that every one should be finished and no one should remain alive. In her Police case diary statement (Ex.D/3) it has been mentioned that Sonal said that father has said that every one should be finished and no one should remain alive, but this statement was recorded on 15-6-1999 i.e. about one month three days after the incident. She was discharged on 3-6-1999 from the hospital. Since there is contradiction in the statement dated 19-5-1999 recorded by Tahsildar & in the Police case diary statement dated 15-6-1999, no explicit reliance can be placed on her above evidence regarding the fact that the father of Sonal had stated that every one should be finished and no one should be left because on first opportunity when she gave statement, she had not disclosed that fact about Dhanya Kumar, therefore, this is after thought.

43) Moreover, as per the prosecution case, the conspiracy was already hatched between Dhanya Kumar & other three accused persons and in furtherance of that conspiracy these three persons went to take away the property documents and everything was already settled earlier at the time of hatching the conspiracy, then where was the occasion for Sonal for saying that Papa has said that every one should be finished and no one should remain alive. If this is taken like that then accused Majeed Mirja & P. Santosh had no occasion to conspire with Dhanya Kumar. Therefore, this is an important improvement and unnatural statement of Archana, which does not inspire full confidence of the Court looking to the facts and circumstances of the case.

44) For the foregoing reasons, the prosecution has utterly failed to establish all the three circumstances against accused Dhanya Kumar that he hatched conspiracy with the co-accused persons at about 10.00 p.m. in the night 5-6 days prior to the date of incident near the photo studio of PW-24 Ashok Kumar or that the documents/file was given by Sonal to

160

Dhanya Kumar in furtherance of the conspiracy after taking out the same from the house of deceased Manoj or that the documents/file was recovered at the instance of accused Dhanya Kumar or that accused Sonal stated at the time of commission of crime that father has said that every one should be finished and no one should remain alive. There is no other circumstance to establish the fact that Dhanya Kumar along with other accused persons hatched a conspiracy to commit the crime that too bring the documents from the house of Manoj & commit any other crime.

45) Applying the principle regarding establishing the conspiracy laid down by the Apex Court, after careful scrutiny of the evidence of the witnesses & record of the trial Court, we are of the considered opinion that the prosecution has utterly failed to establish that accused Dhanya Kumar hatched conspiracy with other co-accused persons to commit the crime.

46) As far as conviction under Sections 201 & 411 of the IPC is concerned, since the prosecution has utterly failed to establish that the documents were recovered from the exclusive possession of accused Dhanya Kumar, these charges automatically fails.

47) For the foregoing reasons, the conviction imposed upon accused Dhanya Kumar for commission of offence under Sections 120B, 201 & 411 of the IPC cannot be sustained.

SONAL KUMAR JAIN @ SONU JAIN, MAJEED MIRJA & P. SANTOSH

48) Accused/appellant namely, Sonal Kumar Jain @ Sonu Jain has been charged & convicted for commission of offence under Sections 302, 302 & 307 with the aid of Section 34 of the IPC and 380, 201 & 460 of the IPC whereas accused/appellants namely, Majeed Mirja & P. Santosh have been charged & convicted under Sections 302, 302, 307, 380 & 460 of the IPC.

49) The prosecution has tried to establish the crime against these three accused persons based on the testimony of sole injured eyewitness namely, PW-18 Archana Jain (wife of deceased Manoj), who was present in the room at the time of commission of crime. The recovery of key of the lock as also recovery of documents C-1 to C-80 alleged to have been taken away from the Almirah of Manoj and the blood stained clothes of Sonal. Finger print of Sonal was found on the door 'F' of locker of steel Almirah from which documents were stolen. Against accused Majeed Mirja & P. Santosh, apart from the testimony of Archana, there is evidence of recovery of blood stained iron rods, weapons of offence, at the instance of these accused persons,

(161)

their identification by Archana before the Executive Magistrate and recovery of their blood stained clothes.

50) Till 19th May, 1999 the investigating agency was not able to detect the culprits. However, accused Dhanya Kumar & Sonal were being regularly interrogated about the commission of crime on a suspicion that there was a dispute between accused Dhanya Kumar & deceased Manoj regarding properties. Only when on 19-5-1999 PW-18 Archana, who was in hospital, was able to give her statement, for the first time, her dying declaration (Ex.P/69) was recorded by the Executive Magistrate. Then only the investigating agency was able to know that Sonal, nephew of Manoj, along with two other accused persons committed the crime in question i.e. ghastly murders of Manoj & Pavi and attacked Archana to commit her murder.

51) Archana has been examined as PW-18, who has stated that in the fateful night she along with her husband Manoj & minor son Pavi went for sleep at about 10.00 p.m. in the bed room of their house situated at Sasaholi. She woke up at about 12.00-12.30 in the night and went to bath room for urination. Thereafter she returned to bed room. Light of the room was off & cooler was on. However, light in the corridor adjoining to the room was burning. All of sudden, in the night, she heard a sound, woke up & saw that Sonal along with two persons entered the house, who are present in the Court. At that time light of the room was burning. Sonal was standing in front of Archana holding Pavi in his hand whereas another accused Majeed Mirja was standing there keeping one of his leg on the body of her husband, he was holding rod in his hands & attacked her husband with the same. Accused P. Santosh was also standing there holding rod in his hand. After seeing Sonal, she said "*Sonu you ?*". When she said so Sonal asked for key of Almirah and threw/dropped Pavi on the ground. Then she replied that the key is behind photograph. Sonal said that his papa has said that no one should be left alive. Sonal asked that he is taking away the file from Almirah. When she stood up to lift Pavi, accused P. Santosh attacked her with a rod. When she took turn, he again attacked her from behind. She after holding her head said that "*whatever they want they can take, but they should leave them*". In the meantime, P. Santosh again made third attack on her, as a result of which she became unconscious. When she saw the morning light, she felt like to go for answer the call of nature, therefore, she went to answer the call of nature. She removed the clothes in bath room for answering the call of nature and thereafter she came out, but she was not able to wear clothes, therefore, she thought that she should go to bed room & wear gown. When she reached bed room, she saw that Manoj & Pavi were lying in a pool

(162)

of blood. She tried to move the body of Manoj, but he did not speak anything. Thereafter she became unconscious and she regained consciousness in MMI Hospital only, when one officer recorded her statement. She has further stated that two days prior to the date of incident, accused P. Santosh came to her house & enquired from her about presence of Sonal, then she said he must be in the field.

52) On 12-5-1999 first Archana was taken to Mission Hospital, Tilda, where her injuries were examined by Dr. Umesh Suna (PW-8) from where she was taken to Government Hospital, Raipur & then to MMI Hospital, Raipur, where Dr. Kishore Jha (PW-16) treated & examined her injuries.

53) Shri Surendra Singh, learned senior counsel for the appellants, argued that in the statement of Archana (PW-18) recorded by the Executive Magistrate on 19-5-1999, she did not disclose that Sonal was holding Pavi in his hand. Rather she had stated that first attack was made on her, then she asked Manoj to wake up and thereafter only Manoj & Pavi were attacked, therefore, her evidence does not inspire confidence on account of the contradictions between her Court evidence & previous statement. He further argued that as has come in the evidence of this witness that the deal for sale of boiler was already stuck, therefore, in order to take money she called her brother & in the meantime some body came to know that there must be sale money in the house of Manoj, therefore, some unknown persons entered the house in the fateful night in order to loot the money, everything happened in darkness, nobody knows who committed the crime & on account of the personal dispute Sonal & his father have been implicated falsely by the brothers of Archana in order to grab their family property. Learned counsel also argued that in this case there is no other eyewitness, looking to the dispute between the two families, Archana being the wife of the deceased and looking to the infirmities in her evidence no explicit reliance can be placed on her evidence without corroboration. He placed reliance on the judgments of Apex Court rendered in the matters of **Sohan and another vs. State of Haryana and another**[7] & **Shivaji Sahebrao Bobade and another vs. State of Maharashtra**[8].

54) Having heard learned counsel for the parties, we have perused the evidence of PW-18-Archana as also the material on record.

---

[7] AIR 2001 SC 1380
[8] AIR 1973 SC 2622

(163)

55) In the matter of **Munshi Prasad and others vs. State of Bihar**[9] the Apex Court has held that :

> "While appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of."

56) As far as the judgment of Apex Court in the matter of **Sohan** (supra), cited by learned senior counsel is concerned, the same is distinguishable on facts. In that case apart from the single eyewitness 'H' there was another eyewitness, but he was not examined. After scrutiny of the evidence of eyewitness 'H' the Apex Court held that there are lot of infirmities and material contradictions in his evidence. Court held that the prosecution case entirely rested on the evidence of sole evidence of eyewitness 'H' who was not only interested being the cousin of the deceased and was inimical too to the accused in view of the civil litigation. Therefore, it was held that it was unsafe to act on his evidence without any corroboration. Although there were material witnesses available to corroborate, their non-examination or withholding their evidence was a serious lacuna in the prosecution case.

57) Similarly, in the matter of **Shivaji Sahebrao Bobade** (supra), the Apex Court held that even if the case against the accused hangs on the evidence of a single eyewitness it may be enough to sustain the conviction given on sterling testimony of a competent, honest man, although as a rule of prudence courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs.

58) The settled law on the point is that on the testimony of a single eyewitness, if the same is trustworthy & sterling worth, conviction can be rested without corroboration, even if he is the relative of the deceased or the victim of the crime and even he/she is on inimical terms with the culprit. The only precaution the Court is required to take is that the evidence of such sole witness must be put to strict & close scrutiny and examine with great care & circumspection. The evidence of a sole injured eyewitness must be given

---

[9] (2002) 1 SCC 351

(1641)

more weightage on account of the fact that injury establish the presence of witness at the time of incident and on the place of occurrence.

59) In the matter of **Namdeo vs. State of Maharashtra**[10], the Apex Court has held that a close relative cannot be characterized as an 'interested' witness, he is a 'natural' witness, his evidence however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent person.

60) In the matter of **Dalbir Kaur (Mst.) vs. State of Punjab**[11], the Apex Court held that :

> "There can be no doubt that having regard to the fact that the incident took place at mid night inside the house of Ajaib Singh, the only natural witnesses who could be present to see that assault would be Jaswant Kaur and her mother Shiv Kaur. No outsider can be expected to have come at that time because the attack by the appellants was sudden. Moreover, a close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is some how or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here."

61) In the matter of **Harbans Kaur v. State of Haryana**[12], the Apex Court said :

> "There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

62) In the matter of **Rizan and another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur**[13], the Apex Court held that "the relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid

---

[10] 2007 AIR SCW 1835
[11] (1976) 4 SCC 158
[12] (2005) 9 SCC 195
[13] AIR 2003 SC 976

(165)

if plea of false implication is made. In such a case, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible".

63) The Division Bench of Kerala High Court in the matter of **Sahadevan Rajan and others vs. State of Kerala**[14] held that "the straightforward and trustworthy evidence of relations of the deceased need not corroboration for sustaining the conviction. Such evidence cannot be discarded on the sole ground of interestedness in the prosecution case."

64) In the matter of **State of Maharashtra vs. Tulshiram Bhanudas Kamble & ors.**[15], the Apex Court held that so far as the injured eyewitnesses, in the same incident, are concerned, presence of such witnesses at the place of occurrence at the time of incident is beyond doubt. Only because they were inimical to the accused, testimony of eyewitnesses cannot be rejected. Enmity is double-edged weapon. It can be a ground for false implication, but can also be a ground for correct implication. Similarly falsely implicating one accused in murder case cannot be ground to reject the entire testimony of the witness. In India doctrine of *falsus in uno falsus in omnibus* does not apply. The Court further held that the eyewitness, as a result of injury, becoming unconscious and his statement was recorded by the Magistrate in the Hospital immediately after he regained consciousness, failure to name some of accused in the statement discrepancy does not help accused.

65) In the light of above principle, if we scrutinize the evidence of PW-18 Archana, it is not disputed rather it is admitted position that in the fateful night at the time of commission of crime she was very much in the room where the ghastly crime was committed and her presence is established by the fact that the accused persons attacked her also, as a result of which she sustained serious injuries on her head, even skull bone was fractured & brain matter was coming out of the injury. She became unconscious. She remained in the hospital from 12-5-1999 to 3-6-1999. The injuries were serious in nature. Only due to her luck and with blessings of God, she was survived. The prosecution has been able to establish that accused Sonal along with family members were on inimical relations with the family of Archana & her husband (Manoj). Because even after oral partition between the two brothers & particularly when the price of "*Bhondu Ka Bagicha*" escalated, Sonal & Dhanya Kumar started demanding share and they were demanding share in

---

[14] 1992 Cri.L.J. 2049
[15] 2007 AIR SCW 5509

(166)

other properties also. Even the sister of Manoj & Dhanya Kumar, Aunt of Sonal bequeathed 29-30 acres land to Archana through will, which was seized from the house of Archana under Ex.P/13 during investigation, was also a cause of dispute. Therefore, accused Sonal & his father Dhanya Kumar were having motive to commit the crime. Archana is natural witness, why she will falsely implicate Sonal, her close relative, without any rhyme or reason. The defence has not been able to bring on record any circumstance in the cross-examination of this witness i.e. PW-18 Archana or other witnesses, through which an inference can be raised that merely on account of inimical relations, Archana or her family members have tried to implicate the accused persons in a false case, as has been held by the Apex Court in the matter of **Namdeo** (supra) & others matters also that the close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. Even in the statement (Ex.P/69) recorded by the Executive Magistrate on 19-5-1999 in the hospital, PW-18 Archana categorically mentioned that Sonal along with two other persons came & attacked.

66) Doubt regarding other minor discrepancies pointed out by learned senior counsel for the appellants between the statement dated 19-5-1999 and Court evidence is concerned, it is established fact that Archana (PW-18) after sustaining injuries became unconscious on the same day. After treatment & surgery in the MMI Hospital she was able to speak. Even on the day when the statement (Ex.P/69) was given by her i.e. 19-5-1999, she was not totally fit. Thereafter she remained in the hospital for about 15 days. She was badly injured. She was in shock, as she lost her husband & minor son. In such a painful condition her statement was recorded by the Executive Magistrate in question & answer form. Whatever questions were asked to her, she replied in the manner whatever was possible for her. She was not in a position to elaborate about the incident. In fact, that statement was recorded in order to ascertain the culprits involved in the crime, because till then Police was not able to lay hand on any person. Therefore, such minor discrepancies or omissions are bound to creep in the evidence of this witness being a natural witness. We are of the considered opinion that discrepancies or omissions are not fatal to the evidence of this witness. PW-33 Jawahra Mishra, Investigating Officer, has stated that he was regularly enquiring from Doctor of MMI Hospital about the condition of Archana to give her statement and only after Archana was able to give statement, her statement was recorded on 15-6-1999.

(167)

67) As far as the arguments advanced by learned senior counsel for the appellants that since the deal for sale of boiler was stuck and some one was keeping eye that now money must be in the house of Manoj, therefore, in order to loot the money such ghastly crime was committed is concerned, we are afraid as the argument advanced by learned senior counsel is totally contrary to the facts of the present case for the reason that in the first instance Sonal and his family members had a motive to commit the crime. Moreover, no valuables were looted in the incident. Even the ornaments, which Archana was wearing at the time of incident, were present on her body, which is evident from Dehatinalishi (Ex.P/63). Had the crime was committed by unknown persons to loot the property then definitely they would not have left the ornaments of Archana, which were found on her body. Therefore, this fact rules out the possibility of crime committed by some unknown persons to loot the property of Manoj.

68) Shri Surendra Singh, learned senior counsel, further argued that it has come in the evidence of Archana that the light of the room was off when they were sleeping, therefore, there was no occasion for Archana to identify either Sonal or other accused persons.

69) After close scrutiny of the record, we do not find any substance in this argument for the reason that in the first instance it has come on the record & in the evidence of Archna that even when the light of the room was off, the light in the adjoining varandha was burning, therefore, there was every possibility to identify the persons in the light. Apart from that Archana has stated that when the accused persons entered the room, she woke up. At that time the light was burning. Even in her statement (Ex.P/69), recorded by the Executive Magistrate on 19-5-1999, in reply to question No.13, she has categorically stated that when the accused persons were attacking, at that time the electric light of the room & varandha was burning. Therefore, we have no hesitation in coming to the conclusion that as per evidence of this witness at the time of incident light was burning; therefore, she was able to identify the accused persons.

CIRCUMSTANTIAL EVIDENCE IN RESPECT OF SONAL KUMAR JAIN @ SONU JAIN

70) **Recovery of documents :** PW-18 Archana has stated that Sonal asked for key of the Almirah, then she disclosed to him that the key is behind the photograph. Even when the house was inspected by the Investigating Officer the Almirah & locker were found opened. In para 14 of her evidence, PW-18 Archana has stated that the file (Article-C) along with documents C-1

(168)

to C-80 are the articles which were lying in her Almirah before the incident. As has been discussed earlier as per the evidence of PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva, accused Sonal gave memorandum Ex.P/24 that the key & documents are at his residence. PW-33 Jawahar Mishra, Investigating Officer has also stated that on 22-5-1999 Sonal gave memorandum (Ex.P/24) regarding the key & documents. In pursuance of that the documents were recovered on 24-5-1999 under Ex.P/25 on being produced by Dhanya Kumar. PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva, have also stated that the documents were seized under Ex.P/25 and that bears their signature. Therefore, from the evidence of these witnesses, it is established that the documents which were lying in the Almirah of Manoj, were taken by Sonal and other accused persons. Those documents were recovered on 24-5-1999 from the house of Sonal. How those documents, which were lying in the Almirah of Manoj, reached to the house of Sonal, has not been explained by Sonal.

71) Learned senior counsel for the appellants argued that PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva are not the witnesses of the vicinity and they are pocket witnesses, therefore, reliance cannot be placed on their evidence.

72) In the first instance Archna (PW-18) has categorically stated that the documents were in their Almirah, the key of which was asked by Sonal, accused persons attacked her, as a result of which she became unconscious and thereafter the documents were recovered at the instance of accused Sonal. That is the evidence of PW-33 Jawahar Mishra, Investigating Officer also. In the cross-examination of these three witnesses no material has been brought on record, which discredit the evidence of these three witnesses that the recovery of the documents was not effected from the house of Sonal or that these documents were not in possession of Manoj & Archana. In these documents some documents are exclusively relating to the property of Manoj, some documents are relating to the property of both the brothers, therefore, it cannot be said that these documents cannot remain in possession of Manoj. Apart from that PW-33 Jawahar Mishra, Investigating Officer, in para 70 of his cross-examination stated that he had asked to call the witness of vicinity to make recovery, but nobody came. It is a matter of common knowledge that normally independent persons are reluctant to become witness in Police case. Apart from that Investigating Officer has to ensure that witness must be a person who should not be influenced by accused and a man of integrity. Moreover, in cross-examination of PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva, the

defence has not been able to establish that these two witnesses are either interested in Archana or they are the pocket witnesses of Police agency, therefore, their evidence, only on this count, cannot be discarded that they are not from the same vicinity.

73) **Recovery of key :** PW-33 Jawahar Mishra, Investigating Officer has stated that on 22-5-1999 accused Sonal was taken into custody. He gave memorandum (Ex.P/24) regarding the place where he had kept the key of lock, which was put on the main door of house of Manoj, after commission of the crime as also the documents, which bears his signature. That was recorded at about 2.00 p.m. The accused was taken for Police remand before the Magistrate, Raipur, therefore, recovery of the key was effected on 23-5-1999 in presence of PW-3 Nirmal Kumar Dubey & PW-21 Anil Kumar Wadhva. Accused Sonal got recovered the key from his house, which was lying in a pipe near the stairs. From the evidence of two independent witnesses & PW-33 Jawhar Mishra, Investigating Officer, it is established that the key was recovered at the instance of Sonal from an iron pipe lying in the house of Sonal.

74) PW-33 Jawahar Mishra, Investigating Officer, has also stated that on the fateful day when in the morning intimation was given regarding the untoward incident in the house of Manoj, he along with his team reached on the spot and saw that the house was locked from outside. Therefore, a crow bar was called for and the lock was broke open. Panchnama (Ex.P/5) regarding breaking of lock was prepared. Key was seized on 23-5-1999 under Ex.P/22. Thereafter in order to verify as to whether the key was of the same lock, which was found on the door of Manoj, the key was applied on the lock & it was found that the lever of the lock was operating, by applying the key which was seized at the instance of accused Sonal from his house. Memorandum to that effect regarding applying the key on the lock (Ex.P/26) was prepared.

75) The lock in question was placed before the trial Court. Even it was produced before us and we saw that the key, which was tendered into the evidence in trial Court was applying & lever of the lock was moving by applying that key. The last corner of the hook, which stuck in the liver, become flat to an extent on account of blow by an iron object and that is why it came out from the liver when the lock was broke open. There are marks of blow on the lock by an iron object. On account of blow by an iron object some portion of the lock is damaged. Even the said lock was sent to FSL,

Sagar. As per the report (Ex.P/103) at page 247-248 of the paper book, the locking plate was operating through the key.

76) Learned senior counsel for the appellants argued that the lock was not sealed and a new lock has been implanted in order to establish that the key of the lock was recovered from the house of Sonal.

77) It is true that there is nothing on record, which shows that after the lock was broke open the same was sealed. Panchnama (Ex.P/20) was prepared before breaking the lock. This panchnama bears the signature of Nirmal Kumar Dubey & Padumnath, which establishes that there was a lock on the main door of the house of deceased Manoj. Perusal of seizure memo (Ex.P/5) shows that after breaking the lock, in the seizure memo name of the lock & other particulars are mentioned, which bears the signature of Padumnath & Nirmal Kumar Dubey. Even perusal of panchnama (Ex.P/26) reveals that the key, which was seized at the instance of accused Sonal under Ex.P/22, was applied on the lock, which was broke open from the main door of the house of deceased Manoj. Nothing has been brought on record by the defence in cross-examination of PW-2 Padumnath, PW-3 Nirmal Kumar Dubey & PW-33 Jawahar Mishra, Investigating Officer, which establishes the fact that the lock, which was broke open from the main door of house of Manoj, was replaced by new lock & key in order to show that the key was recovered at the instance of accused Sonal. Therefore, for this reason, we do not find any substance in the argument advanced by Shri Surendra Singh, learned senior counsel for the appellants. Even if the lock was not sealed that does not effect the recovery of key at the instance of accused Sonal.

78) Learned senior counsel for the appellant argued that since Sonal and his father were being interrogated since 13-5-1999 up to 19-5-1999 in such a situation it was not natural conduct of any human being to keep the key of the lock in his house, particularly when he was knowing that Police is suspecting his involvement.

79) This is a hypothetical argument. One does not know about the mind of a criminal, what was working in his mind at that time. It depends on person-to-person that how he will behave & conduct himself in particular circumstances. In the present case accused Sonal kept the key in an iron pipe, which was lying in his house and that was produced by the accused himself in presence of witnesses, which was seized under Ex.P/22, without any material infirmities or manipulations in the recovery. It is difficult to disbelieve the recovery made by the Investigating Officer in presence of two

witnesses. The recoveries cannot be doubted merely on the basis of human imagination unless and until something is brought on record, which is suggestive of a definite conclusion that the recovery was fake one. There is nothing on record against these two witnesses, which discredit the testimony of these two witnesses. Therefore, from the above discussion, it is established that after the commission of crime, the lock, which was lying in the varandha of Manoj, was put on the door, key was taken away by Sonal with him. The said key was concealed in an iron pipe lying in his house. It was recovered at the instance of accused Sonal. Therefore, this is also an additional circumstance to establish the involvement of accused Sonal in the crime in question.

80) **Finger Print :** Another circumstance adduced by the prosecution is that the finger print of accused Sonal was found on the door of locker of Almirah of deceased Manoj. PW-11 Sanat Kumar Jain, has stated that he is working as a Finger Print Expert since 1985 in the Finger Print Bureau of Police Department. On 12-5-1999 he received information from Police Control Room, Raipur, that murder has been committed in Nevra, therefore, he should reach there. After receiving the information he reached the spot (village Sasaholi) with a Constable. He inspected the site in order to find out the finger prints. He examined one Steel Almirah, four Steel Boxes & two Plastic Boxes, but out of those he was able to lay hand on the door of locker of Almirah. He thought that there must be finger prints on that, therefore, he applied powder at the place of door where he was suspecting the finger prints. After applying powder he developed that place. After encircling the same he put his signature with date. That door is 'F', on which the finger print was detected. On 12-5-1999 he gave requisition (Ex.P/48) to Police Station, Nevra, regarding the finger prints, which were found on the spot. On 21-5-1999 he received photographs of finger print and on 26-5-1999 he received the undisputed finger prints of suspects. He examined the questioned finger prints & sample finger prints. Thereafter he examined the photographs of the finger prints & sample finger prints. After enlarging three times, he examined the finger prints and those are in the Court (Ex.P/49 & Ex.P/50). Ex.P/49 bears his signature. Finger print of the ring finger of right hand was found on the door 'F'. After comparison with the sample finger print he reached to the conclusion that the finger print found on the door 'F' of the locker & sample finger print were of the same person. He has stated that from 15-5-1999 to 13-6-1999 he was on leave. He returned only on 14-6-1999. He made the comparison of the suspected finger prints with

sample finger prints after one week of joining. He prepared report vide Ex.P/51 on 5-7-1999.

81) PW-28 Nirmal Singh Thakur, has stated that he is working as a Photographer in Police Line, Raipur. On the date of incident he went to the spot along with Finger Print Expert S.K. Jain. He took the photograph from the door of the locker. Negative of the same is Ex.P/49-A, photograph is Ex.P/49, enlargement is Ex.P/50 & enlargement negative is Ex.P/50-A. The same was taken on 12-5-1999. In cross-examination, he has stated that along with him he took one full roll of film & one cut roll. Out of the main roll about 21 photographs were taken and 10-11 photographs of the site & photograph of finger print was taken from the cut roll.

82) Learned senior counsel for the appellants argued that this witness has stated that no date was put by this witness on the negative of finger print (Ex.P/49-A & Ex.P/50-A) and one slip was affixed on which the date was written, it shows that the photographs were not taken on the same day otherwise he would have put the date on the negative on the same day, but in cross-examination of this witness, the defence has not been able to elicit or substantiate the allegation levelled by learned senior counsel. PW-28 Nirmal Singh Thakur has categorically stated that S.K. Jain, Finger Print Expert, put the date on the door. The dates of 20-6-1999 & 28-6-1999 are the dates on which the photographs were developed & print was prepared. He has specifically denied that the photograph was taken in the month of June. In fact the photograph was taken on 12-5-1999. The slip (Ex.P/50), which was affixed by him, is of the same colour.

83) PW-11 Sanat Kumar Jain, has categorically stated that he reached the spot on the date of incident i.e. 12-5-1999. He was able to detect the finger print on the door of the locker and immediately, after developing through powder, he encircled the finger print & put his signature. On that day itself photograph was taken by PW-28 Nirmal Singh Thakur. There is nothing to disbelieve these two Government officials, why they will implicate the accused in a false case & why they will prepare a false record. It does not sound to the reason that why they will unnecessarily put a wrong date in order to implicate the accused in a false case.

84) Learned senior counsel for the appellants placed reliance upon the decision of the Apex Court in the matter of **Mohd. Aman and Another vs.**

(173)

State of Rajasthan[16] and argued that the prosecution has failed to establish that the finger prints were not tampered with.

85) The facts of the case of **Mohd. Aman** (supra) are distinguishable. In that case brass jug was not produced or exhibited during trial in the Court and there were over writing in the forwarding letters. Therefore, the Apex Court held that the conviction cannot be based on the finger prints on brass jug. Even the foot prints and the glass tumbler were seized after ten days of the incident. The Court held that chances of fabrication of evidence cannot be ruled out. The Court also held that the articles seized and articles examined by the Finger Print Bureau was missing whereas in the present case PW-11 Sanat Kumar Jain, Finger Print Expert, has categorically stated that on very first day i.e. 12-5-1999 he reached the spot and on that day itself he was able to detect the finger prints on the door of locker of Almirah. After applying powder, the same was developed; it was encircled & signed by him in order to ensure that the finger prints should not be mishandled by any one. Even PW-28 Nirmal Singh Thakur has also stated that photographs were taken on the same day.

86) The objection raised by learned senior counsel is that S.K. Jain examined the finger prints after about more than one month whereas it could have been examined within a day. In this case one month time was taken as in the first instance S.K. Jain has stated that from 15-5-1999 to 13-6-1999 he was on leave. PW-29 Chetram Sahu, Constable, has stated that on 25-5-1999 he took the sample finger prints of Sonal (Ex.P/45) and it was sent to FSL, Raipur. On 25-6-1999 he went to FSL, Raipur, from where he received photographs & negatives in sealed envelope, which was handed over by him in Police Station, Nevra. Though in this matter in FSL, Raipur, time about more than one month was taken because about a month S.K. Jain was on leave, therefore, there was no inordinate delay in the matter and no suspicion can be raised looking to the above explanation of S.K. Jain.

87) Therefore, in view of the above discussions, it is established that the finger print of accused Sonal was found on the door of locker of Almirah of deceased Manoj, which tallied with the sample finger prints of accused, which were taken by PW-29 Chetram Sahu, Constable, on 25-5-1999. As per the report (Ex.P/51) of S.K. Jain the finger print, which were found on the door of locker of Almirah and the sample finger print of accused Sonal were found to be right ring finger impression. Therefore, through these finger print also presence of accused Sonal in the house of Manoj in the night of incident

---

[16] (1997) 10 SCC 44

(174)

is established and this is also an additional circumstance to connect accused Sonal with the crime in question.

88) **Recovery of clothes :** As per the evidence of PW-33 Jawahar Mishra, Investigating Officer, accused Sonal produced one half bundi (Art.-Z/4) one jeans pant (Art.-Z/5) and the same were seized on 24-5-1999 under Ex.P/33, which bears the signature of accused Sonal from D to D. PW-3 Nirmal Kumar Dubey has also in para 14 of his evidence stated that one bundi & one jeans pant stained with blood were seized from the house of accused Sonal under Ex.P/33, which bears his signature from A to A. PW-21 Anil Kumar Wadhwa, has also stated that the clothes of Sonal were seized under Ex.P/33. Therefore, the seizure of bundi & jeans pant under Ex.P/33 are established by PW-3 Nirmal Kumar Dubey, PW-21 Anil Kumar Wadhwa & PW-33 Jawahar Mishra, Investigating Officer and the same were sent to the FSL, Sagar from where report (Ex.P/105) was received. As per the said report, blood was found on bundi & jeans pant i.e. X-1 & X-2.

89) Learned senior counsel for the appellants argued that since there is no report about presence of human blood that too blood group of the deceased on the clothes of accused Sonal, this cannot be taken into consideration. But we do not find any substance in this argument because this is not a case where the accused is being solely connected with the crime on that basis. In this case there is ocular evidence & other circumstantial evidence regarding the involvement of accused. This is being taken as an additional circumstance.

90) In the matter of **State of Rajasthan vs. Teja Ram and others**[17], the Apex Court held that :

> "Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin ? Such guesswork that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some

[17] (1999) 3 SCC 507

(175)

> objectivity, no benefit can be claimed by the accused.
>
> It cannot be said that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility."

91) Therefore, blood stained clothes of accused Sonal i.e. one bundi & one jeans pant were seized from his house and blood was found on both the articles, which is also additional circumstance regarding the involvement of accused Sonal in the crime in question.

CIRCUMSTANTIAL EVIDENCE IN RESPECT OF MAJEED MIRjA & P. SANTOSH

92) **Recovery of weapons & clothes** : As far as recovery of iron rods, weapons of offence, at the instance of accused Majeed Mirja & P. Santosh is concerned, PW-33 Jawahar Mishra, Investigating Officer, has stated that accused Majeed Mirja gave memorandum (Ex.P/27) that the iron rod has been kept in the chaff in the garden of Manoj and he can get recovered the same, which bears the signature of Majeed Mirja from 'Ch to Ch'. He further stated that accused P. Santosh also gave memorandum (Ex.P/28) that the iron rod has been kept in a wood *Taal* and he can get recovered the same. The memorandum bears the signature of P. Santosh from 'Ch to Ch'. PW-33 Jawahar Mishra has stated that accused Majeed Mirja took him along with the witnesses to the garden of Manoj from where he took out the iron rod. The same was seized under Ex.P/29. P. Santosh also took him along with the witnesses to the wood *Taal* from where he got recovered the iron rod. Seizure memo (Ex.P/30) was prepared.

93) PW-33 Jawahar Mishra, Investigating Officer, also stated that accused Majeed Mirja got recovered one full pant & one half tea shirt. Seizure memo (Ex.P/31) was prepared. Accused P. Santosh also got recovered one full pant & one shirt. Seizure memo (Ex.P/32) was prepared.

94) The above evidence has been proved by PW-3 Nirmal Kumar Dubey and in paras 25 & 26 of his evidence he has stated that one iron rod was seized from the garden of Manoj & one iron rod was seized from wood *Taal*. Memorandum of Majeed is Ex.P/27 & memorandum of P. Santosh is Ex.P/28 and Seizure memo of Majeed is Ex.P/29 & seizure of memo of P. Santosh is Ex.P/30. Regarding seizure of clothes Majeed got recovered the clothes under Ex.P/31 & P. Santosh got recovered the clothes under Ex.P/32, which

bears his signature. The evidence of PW-3 Nirmla Kumar Dubey has been corroborated by PW-21 Anil Kumwar Wadhwa.

95) Learned counsel for the appellants argued that as per the evidence of these witnesses the iron rods were visible and were recovered from open place, as such the same cannot be believed.

96) We do not find any substance in this argument. As per the seizure memo Ex.P/29, accused Majeed produced the rod after taking out the same from the stack of chaff. The same was stained with blood. Similarly accused P. Santosh also produced the iron rod, stained with blood, after taking out the same from the wood *Taal.* Therefore, it cannot be said that the place was open, the articles were easily visible for other persons and the iron rods were not within the exclusive possession of the accused persons. As per the FSL Report (Ex.P/105), blood was found on the rods 'T & U', recovered at the instance of the accused persons. Even PW-14 Dr. D.R. Verma, who conducted postmortem on the bodies of Manoj & Pavi, has stated that injuries found on the bodies of Manoj & Pavi could be caused by the rod in question.

97) Learned counsel for the appellants argued that as per the evidence of PW-8 Dr. Umesh Suna, the injury on the body of Archana was incised and the same could not be caused by the iron rod in question. In the first instance PW-8 Dr. Umesh Suna has stated that he examined the injury and the same could be caused by iron rod. Moreover, it appears that this Doctor was also not experienced about the examination of nature of injury because he has stated that injury was incised one whereas PW-16 Dr. Kishore Jha, Doctor of MMI Hospital, Raipur, where Archana (PW-18) was treated, has stated that there were six lacerated wounds and by the iron rod the lacerated wounds can be caused. Therefore, we do not find any substance in the argument of learned counsel for the appellants. Apart from that Apex Court in the matters of **State of U.P. vs. Krishna Gopal and another**[18] & **Ramakant Rai vs. Madan Rai and others**[19] held that "where the eye-witnesses" account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Importance and primacy should be given to the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of

---

[18] (1988) 4 SCC 302
[19] AIR 2004 SC 77

177

such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scale for a cumulative evaluation.

98) Therefore, it is clear that the eyewitness testimony may contain inaccuracies and exaggerations; there may be errors or omissions on account of lapse of memory or poor power of observations or inability to recount and recite accurately. Sometimes, doctors also may not bestow sufficient care while performing examination or preparing records and their opinion may be based on inadequate or incomplete or defective examination or lack of complete knowledge. It is indeed not fair to expect a total correspondence between these two items of evidence. Court must carefully examine the discrepancies and, if it is reasonably possible, to arrive at the substantial and true version. Court should not throw out the prosecution case on the basis of such discrepancies. Accuracy of medical witnesses and ocular witnesses depends upon several factors. Inconsistency is not sufficient to discredit an eyewitness. Sometimes an eyewitness may allege a blow or stab etc., but there may not be corresponding injuries. The possibility of weapon not actually striking and not causing injury cannot be ruled out. Eyewitness may err in details like direction or the blow etc. Inconsistency regarding such details between the two items of evidence may not be important. There may be discrepancies regarding the weapon or manner of attack. If the eyewitness testimony is clear and convincing, discrepancies cannot matter. Doctor is a witness of both fact and opinion. Medical evidence acts as a check upon testimony of eyewitness; it is also independent evidence in so far as it establishes facts e.g., tattooing marks, nature and dimensions of injury etc. Medical evidence is also corroborative of eyewitness testimony, inasmuch as it may show that the injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injury could not have been caused as alleged and thereby discredit eyewitness testimony. However, unless the medical evidence goes so far that it completely rules out all possibility whatsoever of the injuries taking place in the manner alleged by the eyewitness, the prosecution version cannot be thrown out on the ground of alleged inconsistency between the two items of evidence. Court has to remember that medical evidence is mainly opinion evidence on which the court could form its own independent conclusion. In case of divergence, the Court must

(178)

try to reconcile the two; if that is not possible the court has to appreciate the evidence like any other evidence, having regard to reasons and data provided by the Doctor and the cogency or otherwise of eyewitness testimony. If eyewitnesses are credible and trustworthy, medical opinion suggesting alternative possibility may not be accepted as conclusive. Primacy should be given to oral evidence. ***Please also see :*** **Atami Laxman vs. State of Chhattisgrh**[20].

99) In view of the above consistent reliable evidence, it is established that Archana (injured), Manoj (deceased) & Pavi (deceased) were attacked by iron rods, which were seized under Ex.P/29 & Ex.P/30 at the instance of accused Majeed & P. Santosh, respectively.

100) **Identification :** In order to establish the identity of the accused persons namely, Majeed Mirja & P. Santosh for their involvement in the crime in question both the accused persons were put to the identification before PW-18 Archana. PW-33 Jawahar Mishra, Investigating Officer, has stated that requisitions were sent by him to the Executive Magistrate for identification of the accused persons. Identification memo (Ex.P/71) in respect of Majeed was received by him from Police office under Ex.P/101. Identification memo (Ex.P/70) in respect of P. Santosh was received by hand. Application was given to Judicial Magistrate that accused Majeed & P. Santosh be kept in covered faces as they are to be put to identification parade.

101) PW-19 Ashok Tiwari, Executive Magistrate, has stated that on 22-6-1999 he had gone to Central Jail, Raipur, for conducting identification parade of P. Santosh. He conducted identification parade. He prepared the identification memo Ex.P/70. Signature of Archana is at 'A to A'. Signature of accused P. Santosh is at 'C to C'. In cross-examination, he stated that all precautions were taken. It is incorrect to say that Archana first identified Ramjan. It is incorrect to say that Archana said that on account of her illness she is not able to participate in the identification parade. He did not disclose the identity of the accused to Archana. It is incorrect to say that she could not identify the accused.

102) PW-22 Pranav Singh, Executive Magistrate, has stated that on 23-6-1999 he conducted identification parade of accused Majeed Mirja. He was mixed with eight persons. Archana identified the accused person

---

[20] 2007 Cri.L.J. 1036

(179)

namely, Majeed. Identification report (Ex.P/71) was prepared by him, which bears his signature.

103) Learned counsel for the appellants argued that the accused persons were arrested on 24-5-1999 whereas the identification parade of P. Santosh was conducted on 22-6-1999 & identification parade of Majeed Mirja was conducted on 23-6-1999. On account of this delay of about one month there was every possibility that the accused persons were shown to Archana and such identification parade cannot be believed. Learned counsel also argued that even the photographs of the accused persons were published, posters containing the photographs of the accused persons were affixed on the walls of city by the relatives of Archana. Thereby there was every possibility of disclosing the identity of the accused persons. Even complaint (Ex.D/5) in this regard was made to the Station House Officer, Police Station, Nevra, on 4-6-1999. Learned counsel for the appellants placed reliance on the decisions of the Apex Court in the matters of **Rajesh Govind Jagesha vs. State of Maharashtra**[21] & **Subhash and Shiv Shankar vs. State of U.P.**[22].

104) The settled law on the point is that in order to ascertain the identification of the accused, identification parade must be held at the earliest in order to avert any chance of showing accused person to the witness. Otherwise the identification parade looses all its significance. A test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before.

105) So far as requirement of Test Identification Parade (T.I.P.) is concerned, the law is that even without T.I.P., identification in Court can be believed. It has been held by the Apex Court in the matter of **Ronny vs. State of Maharashtra**[23] that the identification of the accused by a witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in Court and that the absence of corroborative evidence by way of test identification parade would not be material.

106) In the matter of **George vs. State of Kerala**[24], the Apex Court further held that the identification of an accused in Court is the substantive evidence

---

[21] AIR 2000 SC 160
[22] AIR 1987 SC 1222
[23] AIR 1998 SC 1251
[24] AIR 1998 SC 1376

(180)

of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in Court.

107) The Apex Court again held in the matter of **Dastagir Sab and another vs. State of Karnataka**[25] that non-holding of T.I. parade would not by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case; would depend upon the facts and circumstances of each case.

108) In fact the substantive evidence of identification of an accused is the one made in the Court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been lodged against unknown persons, a test identification parade is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him.

109) In the present case as far as accused Sonal Kumar Jain @ Sonu Jain is concerned, he is a close relative of PW-18 Archana (wife of deceased Manoj). He was already known to her. Even in her statement made on 19-5-1999 she disclosed that out of three culprits, who attacked, one was Sonal, her nephew, along with two other persons. About accused P. Santosh, she stated, in her evidence, that P. Santosh, two days prior to the incident, came to her house and enquired about Sonal, and then she replied that he must be in the field. Even she identified these accused persons at the time of incident because light was burning in the adjoining room & she has identified them in the Court also. Therefore, in Court evidence, she has categorically identified these accused persons regarding their involvement in the crime in question in the fateful night. Even otherwise as far as the delay in conducting the identification parade is concerned, the accused persons were arrested on 24-5-1999 and identification parade was conducted on 22-6-1999 & 23-6-1999. Archana (victim), who identified these two accused persons in the jail before the Magistrate, was seriously injured on account of fatal assault on her head, skull bone was fractured & brain matter was coming out. She was hospitalized till 3-6-1999 and she was discharged on 3-6-1999 only. Even thereafter she was not well, therefore, she immediately left for Akaltara for recovering & regaining the health.

---

[25] (2004) 3 SCC 106

181

110) PW-33 Jawahar Mishra, Investigating Officer, in para 58 of his evidence has stated that he enquired from the Doctor about Archana. Doctor had advised that Archana is not fit to give statement. Even on 29-5-1999 he went to the hospital for recording the statement of Archana. Doctor advised that she is not fit to give statement. He recorded the statement of Archana on 15-6-1999. In para 86 of cross-examination he has categorically denied that the accused was shown to Archana on 21-6-1999. He has also denied that the photographs of P. Santosh & Majeed Mirja were shown to Archana.

111) Initially Archana was hospitalized. Thereafter she went Akaltara, her native place, for recovery. On 15-6-1999 her statement under Section 161 of the Cr.P.C. was recorded. Thereafter application was moved before the Executive Magistrate for conducting identification parade. Even application (Ex.P/102) was moved by the Investigating Officer before the Judicial Magistrate that the identification of Majeed Mirja & P. Santosh is to be conducted, therefore, they be kept in covered faces. In this case all precautions were taken and delay in identification parade was occasioned on account of health condition of Archana. Moreover, Investigating Officer specifically denied that the accused persons were shown to Archana or the photographs of the accused persons were shown to Archana. Moreover, this defence is bleated one. At the time of identification parade on 22-6-1999 before the PW-19 Ahsok Tiwari, Executive Magistrate & on 23-6-1999 before the PW-22 Pranav Singh, Executive Magistrate, none of the accused raised any objection that they have already been shown to Archana at any place or their photographs were taken and those have been shown to Archana. Therefore, the judgments cited by learned counsel for the appellants in the matters of **Rajesh Govind Jagesha** & **Subhash** (supra) are distinguishable on facts, as there is no deliberate delay in holding test identification parade.

112) As far as publishing of posters containing photographs of the accused persons is concerned, there is no material on record to establish that those posters were shown to Archana. Even though application (Ex.D/5) was made to the Station House Officer, Police Station Nevra on 4-6-1999 regarding the posters. The Investigating Officer had already taken precaution by moving application (Ex.P/102) before the Judicial Magistrate for keeping the accused persons in covered faces (*Baparda*), because they were already in the judicial custody.

113) For the foregoing reasons, we are of the considered opinion that there is no infirmity or illegality in the identification parade conducted by the Executive Magistrates, in which the accused persons were identified by

Archana. Moreover, this is corroborative evidence. The substantive evidence is the identification of accused persons by the witness in the Court. The accused persons were correctly identified as the crime was committed in the light where Archana was talking with accused Sonal and for quite sometime she saw the accused persons in the light. It is not a case that the accused persons were in covered faces or otherwise. Therefore, the identity of the accused persons has been established through legally admissible clinching evidence.

114) Learned counsel for the appellants namely, Majeed Mirja & P. Santosh argued that there was a strike about more than a month in all the rice mills. Accused Majeed Mirja was the President of Janvadi Mukti Morcha and accused P. Santosh was his associate, therefore, the rice millers were angry with these persons. Therefore, they have been falsely implicated.

115) Considering the over all evidence on record, we do not find any substance in this argument. In the first instance there is nothing on record that on account of strike the Police was angry with these accused persons or in that strike some animosity was created between the family of Archana or the accused persons so as to implicate the accused persons in a false case. Therefore, the ground raised by learned counsel for the appellants is without any foundation.

116) For the foregoing reasons, we do not find any illegality or infirmity in the finding of the trial Court. Because all the three accused persons namely, Sonal Kumar Jain @ Sonu Jain, Majeed Mirja & P. Santosh entered the house of Manoj by breaking the house to commit the crime, accused persons namely, Majeed & P. Santosh attacked Archana, Manoj & Pavi, as a result of which Manoj & Pavi succumbed to the injuries spontaneously, somehow Archana survived, the accused persons committed theft of documents. They have rightly been convicted under Sections 302, 302, 307, 380 & 460 of the IPC.

117) As far as accused Sonal is concerned, he has been convicted under all these offences with the aid of Section 34 of IPC, because he was sharing common intention with accused Majeed & P. Santosh. He was in the room when they were attacking in his presence and he tried to cause disappearance of evidence of the offence in order to screen himself from the offence by concealing the stolen file/documents & key.

183

118) In the result :-

- The appeal filed by Dhanya Kumar Jain succeeds. Conviction & sentences imposed upon him under Sections 120B, 120B, 120B, 120B, 201 & 411 of the Indian Penal Code are set aside. He is acquitted of these charges.
- Accused Dhanya Kumar Jain is on bail, therefore, his bail bonds are discharged. He need not surrender before the trial Court.
- The appeals in respect of accused persons namely, Sonal Kumar Jain @ Sonu Jain, Majeed Mirja & P. Santosh fail being devoid of merit, same are liable to be dismissed and are hereby dismissed.

Sd/-
L.C. BHADOO
Judge

Sd/-
SUNIL KUMAR SINHA
Judge

Gowri